No. 3656

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BALDWIN SHIPPING COMPANY, INC. (a corporation), *Appellant,* vs. SOUTHERN PACIFIC COMPANY (a corporation), *Appellee.*	

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

There are a large number of misleading statements in appellee's brief in this case and the main purpose of this reply is to clear these up and put the situation *as it is* squarely before the court.

I. THE QUESTION OF AGENCY.

It is repeatedly stated by appellee—sometimes directly, but usually by inference—that the lower court sustained appellee's contention that it acted merely as an agent and hence that this finding,

based on conflicting testimony, should not be disturbed. There was, however, no such holding. What the court held was that "*if* the libelee was a mere agent to reserve steamer space, there is no claim of a failure or breach of duty in that regard". The court did not pass on the question of whether appellee was in fact merely an agent, and, moreover, there is no conflicting testimony on this point. The question is, therefore, one for this court to decide as an *original* question, unhampered by any previous ruling.

As to the finding that, *if* appellee acted as a mere agent, "there is no claim of a failure or breach of duty in that regard", we have already pointed out that this is absolutely contrary to the record (see pp. 70-72) and it was, doubtless, an inadvertent misstatement. Appellant's briefs in the lower court (which are still available) plainly show that there *was* such a claim.

On page 3 of appellee's brief there is a *partial* statement of the pleadings, by which it is sought to be shown that the only breach of contract averred was the failure to go through the *mechanical* act of reserving steamer space. A fuller quotation of these pleadings is therefore appropriate:

> "III.
>
> "That, heretofore, to wit, on or about the 22nd day of June, 1917, libelee agreed with libelant to reserve steamer space for the transportation of and to transport, or cause to be transported from San Francisco, California, to Japan, two thousand (2000) tons of pig iron and steel articles, inexcessive sizes, for late July, August

and September 1917, clearance, at the rate of $15.00 per ton, weight or measurement ship's option."

"IV.

"That libelee did not reserve steamer space for said commodity or any part thereof."

"That at divers and various times during the three months, July, August and September, 1917, libelant tendered to libelee said two thousand (2000) tons of pig iron and steel articles, inexcessive sizes, *for transportation* to Japan, *and demanded* steamer space for the transportation of and *the transportation thereof* from the port of San Francisco to Japan, *but libelee failed, neglected and refused to accept said commodity, or any part thereof, for transportation, or to transport said commodity, or cause it to be transported, or to furnish or supply steamer space for the transportation thereof, or any part thereof,* in accordance with the terms of said agreement or at all."

Record, p. 7 (italics ours).

The lower court recognized that these allegations fully covered the case (Record, pp. 108-109) and it is ridiculous to say, as appellee does, that no attempt was made to support these allegations. We contend that appellee's obligations under its contracts went much further than the mere mechanical *booking* of space with an irresponsible broker and we feel sure that the court will hold with us on this point.

It is weakly contended by appellee that it gave appellant *"all the information it had",* and it is plainly intended that the court should *infer* that appellant was kept fully posted as to all of the ne-

gotiations with C. R. Haley & Company. Nothing could be farther from the truth. The assertion is based almost solely on the following leading question to the witness Boyson and his answer thereto:

> "Q. Did you then give the Baldwin Shipping Company all the information you had on the subject? A. I did."
>
> Record, p. 98.

In the light of the above the following cross-examination of this witness is interesting:

> "Mr. Glensor. Q. Mr. Boyson, have you an independent recollection of these three contracts, 608, 607 and 613?
>
> A. *I happened to review the files a couple of years ago,* and it is my recollection that I only booked one of these particular contracts.
>
> Q. Which one of them?
>
> A. I could not say, without referring to the files.
>
> Mr. Ford.. Show him 613.
>
> Mr. Glensor. I think book 2; I am not sure. I will show you 607 and 608.
>
> Q. Who was J. N. H.?
>
> A. A party by the name of Mr. J. N. Harper.
>
> Q. Are these two contracts booked by you?
>
> A. Yes, that is my writing.
>
> Q. Now, I call your attention to the fact that the one here booked by J. N. Harper was booked in the form of a letter to C. R. Haley & Co., with a carbon copy to the Baldwin Shipping Co.? A. Yes.
>
> Q. While the two that were booked by you were booked by letter direct to the Baldwin Shipping Co.? A. Yes.
>
> Q. You see that? A. Yes.

Q. *Now, are you still willing and ready to swear that you notified the Baldwin Shipping Co. that you booked these contracts with C. R. Haley & Co.?*

A. *According to these two contracts that I made there I did not notify them that I made the contracts with C. R. Haley.*

Q. The third contracts was actually made by Mr. Harper? A. Yes."

Record, pp. 98-99. (See also Record, pp. 74, 77.)

Only in the case of *one* of the contracts was appellee's letter to C. R. Haley sent to appellant and, even as to this, the witness Roche only says "I *think* it was confirmed to the Baldwin Shipping Co." (Record, p. 101). Appellee, therefore, did *not* give appellant "all of the information it had", but gave it *no information whatever* (see Record, p. 74). Moreover, we hardly think that the court will hold that appellee could take the supine position of *having no information* and therefore *giving none.* Anyone can book space with an irresponsible broker on an *unknown* ship or by an *unknown* line. The assertion that Haley "had previously booked space" or "had space to sell" is, to put it mildly, a hyperbole. It is very clear from the record that he *had no space* and was merely *speculating* in it. Appellee's witness Brown admits that the ocean space situation at that time was "speculative" (Record, p. 93), and Mrs. Green well describes Mr. Haley when she says that "it was my impression that

Mr. Haley booked almost everything he could book" (Id. p. 79).

Appellee states in its brief that "nothing was ever said or done by the appellee with respect to a guarantee to protect the rate" (Brief, p. 10), and that the letters from the Baldwin Shipping Co. *confirming* the making of such guarantee *are no part of the contract* (Id). Counsel forgets that these letters merely purport to *confirm* previous *verbal* arrangements and if these letters did not correctly state what those arrangements were, it was the duty of appellee to have promptly notified appellant of that fact and appellee will not *now* be heard to deny that such was in fact the understanding. The letters of appellee and appellant constitute the contract and must be read together and so read they plainly show a *guarantee* of the rate in question. Moreover, as pointed out in our main brief, this understanding is borne out by the telephone conversations (Record, pp. 41, 74).

We submit that it is too clear for argument that the appellee contracted as a *principal* and not as an agent and further that, even if it did act as agent, it was a very supine agent and violated all the essential duties of a *faithful* agent. So much, too much doubtless, as to the question of agency, which should never have been injected into this case.

II. THE CONTRACTS WERE NOT VOID.

We can add little to what is said in our main brief on this subject. Appellee relies almost solely on the Hamlen case, as was to be expected. We believe that that case can be and has been successfully distinguished, but we also take the much firmer ground that the decision is *wrong* and should not be followed.

We do not think that the explanation made in the Hamlen case of *Northern Pacific R. R. Co. v. American Trading Co.,* 195 U. S. 439, and *Southern Pacific Company v. Interstate Commerce Commission,* 200 U. S. 536, is *at all* adequate. The only ground of distinction is that these cases were decided prior to the passage of the Hepburn Act. But, as pointed out in our main brief, Section 1A of the Interstate Commerce Act was *unchanged* by the Hepburn Act, and, if Section 1A does not apply, then neither has Section 6A (requiring the publication of rates by carriers *"subject to the provisions of this Act"*) any application. Hence, the alleged distinction is no distinction at all and the two Supreme Court decisions are as much in point today as they ever were. It is quite true that the Southern Pacific Company is, in many respects, subject to the Act, but what it did (or promised to do) in this case *is not prohibited by the Act,* but is expressly held by the United States Supreme Court to be legal and binding and within its powers.

Counsel refers to hypothetical cases where a railroad offers to secure steamer space below market rates, with the result that the shipper over its lines gets a rebate. The courts will deal properly with such cases *when they arise,* but they are not in point here. In *this* case there was no agreement to secure space *below the market rates,* but the fact is that the appellee went out and contracted for the space (in its own name) *at the market rate* and fully protected itself. There was not even the most indirect attempt to grant a rebate. We again repeat that appellee did not stand to lose *a single dollar* on the transaction, unless the party with whom it dealt was irresponsible.

Appellee cites in italics (Brief, p. 16) the *remarkable* holding of the Hamlen case that a guarantee of an ocean rate by a railroad is *ultra vires*—a holding *squarely opposed* to the two decisions of the United States Supreme Court before referred to. We shall not, however, further discuss this subject. No matter of *ultra vires* was either *pleaded* or *proved* in this case and it is elementary law that such a defense must be pleaded and proved in order to be available as a defense. Counsel recognize this in their discussion of the case of *St. Louis Ry. v. Birge-Forbes Co.,* 139 S. W. 3 (Brief, p. 20). As to their attempt to distinguish that case, we submit that it is wholly unsuccessful.

We submit in conclusion that the whole reason for this suit was the marked change in the freight

market *after* the contracts were made. Ordinarily this would not have prevented the carrying out of the contracts. Unfortunately, however, the late world catastrophe with its resultant violent shifting of values has in many cases strained to the breaking point the business morality of many whose reputation has been above reproach and, as a consequence, "contract cancellations" have been so numerous as to have brought universal reproach and disrepute upon much of the business world. Counsel for appellee say that *"for reasons undisclosed in the record,* this freight did not move from San Francisco when it arrived". Those reasons are, however, not far to seek and they plainly show *why* this case is now before the court.

Dated, San Francisco,
May 11, 1921.

Respectfully submitted,

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S. Hasket Derby,
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Ernest Clewe,
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